7A Am. Jur. 2d Automobiles § 138

American Jurisprudence, Second Edition | November 2021 Update

Automobiles and Highway Traffic
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III. Licensing, Taxation, and Registration

B. Drivers or Operators

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(3) Refusal to Submit to Intoxication Test

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§ 138. What constitutes refusal

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West's Key Number Digest

West's Key Number Digest, Automobiles 144.1(1.20)

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Driving while intoxicated: subsequent consent to sobriety test as affecting initial refusal, 28 A.L.R.5th 459
Sufficiency of showing of physical inability to take tests for driving while intoxicated to justify refusal, 68 A.L.R.4th 776

In determining whether a driver has refused a breath alcohol test, the driver's entire conduct, not merely words expressing consent or refusal, informs the determination.[1] Anything short of an unqualified, unequivocal assent by an arrested motorist to an officer's request that the arrested motorist take the chemical test to detect intoxication constitutes a refusal to do so, as basis for administrative license revocation.[2] If an arrested driver is requested to submit to a breath test and, after the statutorily required advice is given, he or she does not promptly do so, he or she has refused to submit, subject to a flexible regard for arrested persons' freedom to communicate, that is, communicate with another person, such as an attorney; but a refusal to submit need not be explicit, as any attempts to delay or impose conditions on testing amount to a refusal of the test.[3] A refusal of

a driver to submit to chemical tests for intoxication has been interpreted to mean a volitional failure to do what is necessary in order that chemical tests can be performed.[4] Under statutes providing for the suspension or revocation of a driver's license because of the refusal of the holder to submit to an intoxication test, various actions or positions have been held to be a refusal, or an unreasonable refusal, to take such test, among which are refusal to accompany a police officer to a distant hospital for the purpose of the test,[5] conditioning consent upon the test being given at a hospital of the driver's choice,[6] and an assertion, by the motorist, of physical incapacity,[7] or because, by reason of some physical ailment or disability, submission to the test would cause discomfort to the driver.[8] An unreasonably delayed consent to testing,[9] a refusal to take the test followed by a request for the test after an unreasonable delay,[10] continually avoiding or ignoring the arresting officer's request for a test after numerous opportunities to comply,[11] a consent to take the test "under protest,"[12] intentionally preventing accurate testing,[13] a failure to follow an officer's directions concerning performance of the test,[14] stubborn silence or by a negative answer,[15] fleeing the scene,[16] or an ambiguous reply, may also constitute refusal.[17] An arrested motorist "refuses" to submit to a chemical test to detect intoxication when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test.[18]

Certain severe physical injuries may excuse a driver's refusal to be tested.[19]

Observation:

A driver's initial refusal to submit to chemical testing in accordance with express consent law may be rectified by later, though timely, consent and cooperation;[20] however, where the officer has requested the test, determined that the driver is refusing testing, completed his duties prescribed by statute to deal with a refusal, and left the presence of the driver, the time period during which the driver must show cooperation has come to an end.[21]

CUMULATIVE SUPPLEMENT

Cases:

Punishing drunk-driving suspects' refusal to undergo a blood test with automatic license revocation does not violate their due process rights if they have been arrested upon probable cause; on the contrary, this kind of summary penalty is unquestionably legitimate. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amends. 4, 14. Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

Motorist suspected of driving while intoxicated did not cooperate with arresting deputy when the deputy was engaged in requesting or directing a chemical breath test, and thus his attempt to retract his initial refusal to take test was untimely; motorist refused two tests before deputy drove him to the jail, deputy had already left motorist's presence and focused on criminal investigation before motorist attempted to retract his refusal, and there was no evidence that motorist tried to retract his refusal before officer turned him over to jail staff or that he had quickly become unsure of his initial refusal. Colo. Rev. Stat. Ann.

§§ 42-2-126, 42-2-126(5)(b)(I), 42-2-126(9)(b), 42-4-1301.1. Schulte v. Colorado Department of Revenue, Division of Motor Vehicles, 2018 COA 140, 488 P.3d 419 (Colo. App. 2018).

Finding of Commissioner of Motor Vehicles, that driver refused to submit to breath test, was not supported by substantial evidence, despite a printout from breath test which read "test aborted refusal" and report in which arresting officer stated driver refused to submit to the breath test, where information before the hearing officer included only conclusions by two police officers who were at the scene, arrested driver, and processed driver, but did not include descriptions of driver's behavior, conduct, or words indicating that driver refused. Regs., Conn. State Agencies § 14-227b-5. Fernschild v. Commissioner of Motor Vehicles, 177 Conn. App. 472, 172 A.3d 864 (2017).

Trial court's finding, that motorist failed to establish that he did not refuse to submit to chemical test under summary suspension statute, also known as the implied consent statute, was not against manifest weight of evidence in proceeding to rescind statutory summary suspension of motorist's driver's license; even if motorist established that he did not refuse to submit to breath test, he failed to establish that he did not refuse to submit to a test of his blood or urine, and sworn report showed motorist had refused to submit to, or failed to complete, chemical testing and also indicated the place and time of that refusal. 625 Ill. Comp. Stat. Ann. 5/11-501.1. People v. Relwani, 2018 IL App (3d) 170201, 421 Ill. Dec. 152, 99 N.E.3d 152 (App. Ct. 3d Dist. 2018), appeal allowed, 420 Ill. Dec. 737, 98 N.E.3d 41 (Ill. 2018).

Police officer had reasonable grounds to believe that motorist was driving or attempting to drive while under the influence of alcohol, as needed to obtain a suspension of license under implied consent law based on motorist's refusal to take a test for alcohol concentration, where officer found motorist in driver's seat of his parked vehicle with keys in ignition, motorist was trespassing on his ex-girlfriend's property and refused to leave, motorist had extremely bloodshot eyes, slurred speech, and a strong odor emanating from his breath and person, and motorist refused to participate in any field sobriety tests. Md. Code Ann., Transp. § 16-205.1. Motor Vehicle Administration v. Pollard, 466 Md. 531, 222 A.3d 177 (2019).

Officers' oral advisements to driver who had been stopped on suspicion of intoxicated driving, after a complete reading of advice of rights form, did not pose a statutory or due process violation; the officer's reading of the form guaranteed full advisement of administrative sanctions, including that if he refused to submit to a test, his commercial driving privileges would be disqualified for one year or for life if they had been previously disqualified. U.S. Const. Amend. 14; Md. Code Ann., Transp. § 16-205.1. Owusu v. Motor Vehicle Administration, 461 Md. 687, 197 A.3d 35 (2018).

Driver was not prejudiced by police officer's misleading statement during implied consent warning indicating that driver's refusal to submit to a urine test was a crime, and thus there was no due process violation entitling him to rescission of his driver's license revocation, where driver refused to submit to blood or urine tests, and thus he did not rely on officer's misleading statement. U.S. Const.Amend. 14. Johnson v. Commissioner of Public Safety, 911 N.W.2d 506 (Minn. 2018).

Findings of ALJ, that petitioner refused to submit to a chemical test in violation of Vehicle and Traffic Law and thus that revocation of his driver's license was warranted, were supported by substantial evidence, where record demonstrated that arresting officer, who testified at the hearing, gave petitioner a sufficient explanation of the consequence of refusing to submit to a chemical test, and petitioner refused to testify at hearing to support claim that officer gave him an incorrect explanation of the refusal warnings. N.Y. Vehicle and Traffic Law § 1194(2)(c)(3). Gazda v. New York State Department of Motor Vehicles, 159 A.D.3d 903, 72 N.Y.S.3d 555 (2d Dep't 2018).

A motorist's refusal to submit to alcohol testing cannot be cured with an independent test without also taking the chemical test requested by law enforcement; abrogating *Scott v. N.D. Dep't of Transp.*, 557 N.W.2d 385. NDCC §§ 39-20-01, 39-20-02. City of West Fargo v. Williams, 2019 ND 161, 930 N.W.2d 102 (N.D. 2019).

The record affirmatively showed that driver refused the onsite screening test, even though police officer could not recollect whether there was an express denial, in support of revocation of driver's license; driver was given an opportunity to contact an

attorney, was read the implied consent advisory multiple times, and when asked to take a chemical breath test stated that I dont know and that he was scared, and officer testified that driver refused to provide a breath sample. NDCC § 39-20-04. Sutton v. North Dakota Department of Transportation, 2019 ND 132, 927 N.W.2d 93 (N.D. 2019).

Evidence was sufficient to conclude that deputy's request for onsite screening test for driving under the influence (DUI) was proper, as required to suspend driver's license for test refusal, even if officer's testimony as to deputy's observations was inadmissible hearsay; Department of Transportation's Report and Notice, which was admitted without objection and was not rebutted by driver, indicated that there was single-vehicle crash, odor of alcoholic beverage, poor balance, and an open container. NDCC § 39-20-14(1). Marman v. Levi, 2017 ND 133, 2017 WL 2464539 (N.D. 2017).

[END OF SUPPLEMENT]

Footnotes

1 DePoutot v. Raffaelly, 424 F.3d 112 (1st Cir. 2005) (applying New Hampshire law).

2 Betterman v. State, Dept. of Motor Vehicles, 273 Neb. 178, 728 N.W.2d 570 (2007).

3 Davis v. Driver and Motor Vehicle Services Div. (DMV), 209 Or. App. 39, 146 P.3d 378 (2006).

4 Arnold v. Director of Dept. of Revenue, 593 S.W.2d 624 (Mo. Ct. App. S.D. 1980).

5 Beck v. Tofany, 70 Misc. 2d 273, 332 N.Y.S.2d 938 (Sup 1972).

6 Morgan v. Iowa Dept. of Public Safety, 227 N.W.2d 155 (Iowa 1975).

7 State v. Rajala, 54 Ala. App. 502, 310 So. 2d 223 (Civ. App. 1975); Com., Dept. of Transp., Bureau of Traffic Safety v. Kelly, 18 Pa. Commw. 490, 335 A.2d 882 (1975).

8 Pfeffer v. Department of Public Safety, 136 Ga. App. 448, 221 S.E.2d 658 (1975).

9 Covington v. Department of Motor Vehicles, 102 Cal. App. 3d 54, 162 Cal. Rptr. 150 (2d Dist. 1980).

10 Morgan v. Department of Motor Vehicles, 148 Cal. App. 3d 165, 195 Cal. Rptr. 707 (3d Dist. 1983); Hess v. Tice, 43 Colo. App. 47, 598 P.2d 536 (App. 1979); Matter of Suazo, 1994-NMSC-070, 117 N.M. 785, 877 P.2d 1088 (1994); Reed v. New York State Dept. of Motor Vehicles, 59 A.D.2d 974, 399 N.Y.S.2d 332 (3d Dep't 1977).

11 Garcia v. Department of Motor Vehicles, 185 Cal. App. 4th 73, 109 Cal. Rptr. 3d 906 (1st Dist. 2010); Obrigewitch v. Director, North Dakota Dept. of Transp., 2002 ND 177, 653 N.W.2d 73 (N.D. 2002); Nardone v. Com., Dept. of Transp., Bureau of Driver Licensing, 130 A.3d 738 (Pa. 2015).

12 Payne v. Department of Motor Vehicles, 235 Cal. App. 3d 1514, 1 Cal. Rptr. 2d 528 (1st Dist. 1991).

13 DePoutot v. Raffaelly, 424 F.3d 112 (1st Cir. 2005) (applying New Hampshire law), (the driver expressed consent and then prevented testing); Dozier v. Pierce, 279 Ga. App. 464, 631 S.E.2d 379 (2006) (motorist gave breath samples which were insufficient to cause breath analyzer to register an alcohol concentration); Wei v. Director of Revenue, 335 S.W.3d 558 (Mo. Ct. App. S.D. 2011) (motorist gave breath samples which were insufficient to cause breath analyzer to register an alcohol concentration).

14 Tedder v. Hodges, 119 N.C. App. 169, 457 S.E.2d 881 (1995); Brinkerhoff v. Com., Dept. of Transp. Bureau of Traffic Safety, 59 Pa. Commw. 419, 430 A.2d 338 (1981).

15 Gardner v. North Dakota Dept. of Transp., 2012 ND 223, 822 N.W.2d 55 (N.D. 2012); Hollis v. State ex rel. Dept. of Public Safety, 2008 OK 31, 183 P.3d 996 (Okla. 2008); Nardone v. Com., Dept. of Transp., Bureau of Driver Licensing, 130 A.3d 738 (Pa. 2015).

16 Purcell v. Com., Dept. of Transp., Bureau of Driver Licensing, 689 A.2d 1002 (Pa. Commw. Ct. 1997) (officer had requested that driver take test and had issued *Miranda* warning).

17 Carrey v. Department of Motor Vehicles, 183 Cal. App. 3d 1265, 228 Cal. Rptr. 705 (2d Dist. 1986); Beck v. Cox, 597 P.2d 1335 (Utah 1979).

18 Betterman v. State, Dept. of Motor Vehicles, 273 Neb. 178, 728 N.W.2d 570 (2007).

19 McQuaide v. Com. Dept. of Transp., Bureau of Driver Licensing, 166 Pa. Commw. 683, 647 A.2d 299 (1994).

20 § 125.

21 Gallion v. Colorado Dept. of Revenue, 171 P.3d 217 (Colo. 2007).

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